STAT

THE DIRECTOR OF CENTRAL INTELLIGENCE
WASHINGTON, D. C. 20505

XR

30 August 1976

MEMORANDUM FOR: The Honorable
Mr. John O. Marsh, Jr.
Counsellor to the President

FROM : George Bush

SUBJECT : Foreign Intelligence Surveillance Act of 1976

1. As you know, I remain concerned that the amendments to subject bill which have been made by the Senate Select Committee on Intelligence go considerably beyond the draft bill which the Administration reviewed and concurred in during March 1976. Moreover, the Report issued by the Select Committee on Intelligence on 24 August states that "the bill as amended receives the Administration's continued support."

2. While time may be running out on our ability to influence any of the amendments to the bill in the Senate or the interpretations reflected in the Select Committee's report, I submit the attached point paper for whatever benefit it may be in your efforts to alter some of these provisions. This paper represents the concerns and views of the Defense and State Departments and the CIA.

George Bush

cc: The Secretary of State
The Secretary of Defense
The Attorney General

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Point Paper
for Senate Consideration of
Foreign Intelligence Surveillance Act of 1976

1. Issue:

In Section 2521 (b)(5)(B), use of the word "essential" as defined by the Senate Select Committee is more limiting than intended in the original bill and as reported out by the Senate Judiciary Committee.

Discussion:

There is conflict between the intentions of the Judiciary Committee and the Intelligence Committee as to the meaning of the phrase "deemed essential." We understand the true intent of Congress to be that of the Judiciary Committee; i.e., that foreign intelligence information should include information with respect to a foreign power which is significantly necessary to national defense or the conduct of foreign relations ("Foreign Intelligence Surveillance Act of 1976" Committee on the Judiciary, U.S. Senate, Report No. 94-1035, July 15, 1976, p. 32).

The standard of "essential" is simply too high. The report of the Senate Select Committee on Intelligence (p. 23 of the draft report) makes it very clear that they meant "essential" in its plain meaning, i.e., that without the information our national defense would crumble or we could not conduct our foreign relations. If the bill is enacted with the language of subsection (b)(5)(B) intact, it will probably mean that the United States will be forced to abandon certain electronic surveillance which is directed toward the collection of positive foreign intelligence information and which, although it cannot be said to be "essential," is nevertheless of very great importance to our national defense and the conduct of our foreign relations.

The adoption of the standard of "significantly necessary" will not appreciably alter the standards which must be met in the event the target of electronic surveillance under this bill is a U.S. citizen. The safeguards which have been inserted by the Select Committee on Intelligence provide ample protection, even beyond those established by the Judiciary Committee.

Recommended Action:

Amend Section 2521 (b)(5)(B) to read "significantly necessary" rather than "essential."

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2. Issue:

The provision in Section 2525 (a)(4) requiring the expunging of information about U.S. citizens unrelated to national security should be recognized as requiring only reasonable and practical measures.

Discussion:

The Senate Judiciary Committee reported out a bill requiring that measures be reasonably designed to minimize the acquisition, retention and dissemination of information. This provision is consistent with the present practices, and is one which is within our capacity to carry out.

The requirement calling for expungement of all such information is impractical, yet the Select Committee on Intelligence report calls for the destruction of all such information.

Recommended Action:

In lieu of the Select Committee on Intelligence Report as now written (p. 44 and 44-a of draft report), it is recommended that a statement be placed in the Congressional Record substantially as follows:

"The Senate realizes that expungement of bits and pieces of the original tape recording is impractical. Moreover, it may not be possible to determine at time of intercept that certain information is irrelevant. Therefore, the bill requires only reasonable expunging procedures. Thus, for example, it is expected that where irrelevant information cannot be erased from part of a tape, the procedures would prohibit dissemination of the tape and prohibit including such information in the logs or reports."

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3. Issue:

Section 2525(c) has been amended to provide that in applications for renewal, the judge may require an applicant to submit information obtained pursuant to the original order or to any previous extensions. The intent is that the court will be provided with substantive results of surveillance operations.

Discussion:

This specific provision for the submission of substantive intelligence information obtained pursuant to previous orders authorizing electronic surveillance creates a great risk of proliferation of highly sensitive information which is not necessarily germane to the new findings of probable cause for which the judge is responsible.

Moreover, the Select Committee Report states (p. 31 of draft report) the intention that "the record of applications made and orders granted by the several judges designated under this chapter shall be maintained in such a way that the judges designated under this chapter shall have access to the records of actions taken by the other judges similarly designated." This provision reflects an obvious intent to create a library of records and information which would, as now provided in the bill, contain the very sensitive results of these operations.

Recommended Action:

Modify the wording of Section 2525(c) to eliminate specific requirements for the provision of results obtained, but to retain explicit provision for the submission of such information or evidence required by the judge to make the new findings. Suggested wording is: "In connection with the new findings of probable cause as required by subsection (a)(3) of this section, the judge may require the applicant to submit such information or evidence as he finds necessary to make such new findings."

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4. Issue:

Security of Court Proceedings. Section 2523, subsection (c) provides that the records of proceedings shall be sealed by the presiding judge and shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General.

Discussion:

As noted in the foregoing issue discussion, it is the intent of the Select Committee that there be created a library of records and information related to these actions and that these records would be available to all designated judges.

The security of these proceedings and the records thereof has been a concern of the Director of Central Intelligence from the outset of consideration of this bill. Inasmuch as the DCI has a statutory responsibility for the protection of intelligence sources and methods, it is mandatory that the security of these materials or the security system under which they are controlled be within the cognizance of the DCI.

Recommended Action:

The bill should be amended or, at the least, the Select Committee report should reflect the DCI responsibility in the security area. Amendment should add "and the Director of Central Intelligence." at the end of 2523(c).

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5. Issue:

The disclaimer provision in Section 2527(b) reserving the right of the Senate Committee on Intelligence to obtain information pursuant to Senate Resolution 400 is unnecessary.

Discussion:

The requirements for annual reports of electronic surveillance activities required by Section 2527(a) are not intended to be the sole reports that may be required to be furnished to the Congress. Inasmuch as Section 2527(a) is not a limitation of the Congress' power, proposed Section 2527(b) is unnecessary.

The Executive Branch has furnished to the Church Committee all information relevant to its activities and has continued the same cooperation with the Senate Select Committee on Intelligence. This has been carried out without the necessity of any specific legislation.

Instead of clarifying the authority of the Select Committee on Intelligence to obtain information, Section 2527(b) beclouds the issue. Does it mean that the Select Committee is to be the only Committee? Will not other Committees seek to obtain a similar provision? What does this do to other provisions of the bill which call for submission of reports to the Select Committee on Intelligence, such as required under Section 2528?

Recommended Action:

It is recommended that the disclaimer provision of Section 2527(b) be deleted so that the language of this section will conform to that recommended by the Senate Judiciary Committee. If there is insistence upon some provision to this effect, it is recommended that Section 2527(b) read as follows:

(b) The reporting requirements of (a) above do not preclude Congressional Committees having jurisdiction over such matters to require such reports as may be necessary to carry out their responsibilities under this Act.

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6. Issue:

The detail of certification specified in Section 2524(a)(8)(E) is excessive.

Discussion:

We believe it is crucial that courts not look behind the certificate submitted by the Executive Branch. It is clear in the report of the Select Committee on Intelligence that they agree (p. 46 of draft report). Therefore, it should not be necessary to give the courts highly detailed statements supporting the Executive Branch determinations. The more information given to the judge, the more likely it is that he will be tempted to question the judgments of the Executive Branch senior officials. We believe that the information provided to be given to the courts under subsections (a)(1) - (9) is entirely adequate. Furthermore, subsection (a)(8)(E) is nearly duplicative of (a)(7) and (a)(8)(A) - (D).

Recommended Action:

Delete Section 2524(a)(8)(E).

SUBJECT: Foreign Intelligence Surveillance Act of 1976, dated 30 August 1976

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